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85-1328

No.

IN THE

Supreme Court of the United States

October Term, 1985

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO,
Petitioners,

-vs-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE INDIANA SUPREME COURT

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BASIC QUESTION

Whether the Indiana statute concerning wrongful death (I.C. 34-1-1-2) is in contradiction with the current view of the United States Supreme Court that a recovery for wrongful death has become a part of our common law, thereby rendering such statute unconstitutional for its unequal protection.

SUB QUESTIONS PRESENTED

1. Whether a State Statute Concerning Wrongful Death is an Enabling Statute or Merely Contains a Statute of Limitations.

2. Whether a State Statute Limitation Period Concerning Wrongful Death in a Claim Filed Under Uninsured Motorist Coverage Should be Governed by Contracts or by Torts.

3. Whether an Insurance Company is Subject to the Same Responsibilities and Defenses as a Tort-feasor in an Uninsured Motorist Claim.

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Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE INDIANA SUPREME COURT

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO petition for a Writ of Certiorari to review the judgment of the Indiana Supreme Court entered in the above case on July 18, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is not reported. The Order denying Transfer to the Indiana Supreme Court is not published.

JURISDICTION

The Order denying Transfer to the Indiana Supreme Court was entered on July 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §§1257(2) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides under Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 2, 1983, DAWN BONOMO, on behalf of herself and her two (2) minor children, JARED BONOMO and SUMER LIN BONOMO, filed a suit against the Hartford Accident and Indemnity Company claiming that the company had failed to honor an uninsured motorist policy. On March 16, 1984, the Hartford Company moved for Summary Judgment alleging that the Indiana Wrongful Death Statute contained a two-year condition precedent period for filing a cause of action, and that since two years had run since the date of Mrs. Bonomo's husband's death, her action was barred. The Porter Superior Court, located in Porter County, Indiana, the Honorable Bruce W. Douglas, presiding, granted Hartford's Motion for Summary Judgment on April 27, 1984. On June 20, 1984, DAWN BONOMO moved the Court to correct errors. That motion was denied by the trial court on July 25, 1984.

DAWN BONOMO then filed her action in the Indiana Court of Appeals pursuant to appellate Praecipe on August 21, 1984. The Indiana Court of Appeals affirmed the Summary Judgment made by the trial court on January 30, 1985. DAWN BONOMO timely filed a petition for rehearing before the Indiana Court of Appeals on February 7, 1985, which was denied on May 23, 1985.

Thereafter, on May 29, 1985, DAWN BONOMO timely filed a petition to transfer to the Supreme Court of Indiana, which petition to transfer was denied by the Supreme Court of Indiana on July 18, 1985.

This case involves the question, not addressed by the Indiana Court of Appeals, although raised by the Petitioners, DAWN BONOMO and her children, as to whether the Indiana statute concerning recovery for wrongful death was constitutional. By denying the petition to transfer, the Supreme Court of Indiana also side-stepped the issue of constitutionality of the Wrongful Death Statute.

This matter is now being presented to the Supreme Court of the United States on a Writ of Certiorari for a determination of the constitutionality of the Indiana Wrongful Death Statute (I.C. 34-1-1-2) by virtue of its unequal protection under the law.

In January of 1980, JAMES BONOMO, SR., the father of JAMES BONOMO, JR., purchased uninsured motorist insurance from the Hartford Accident and Indemnity Company under a family policy that covered himself and all persons residing with him in his household. This uninsured motorist policy also included hit-and-run insurance coverage. On March 28, 1980, JAMES BONOMO, JR., the husband of DAWN BONOMO and father of JARED BONOMO and SUMER LIN BONOMO, was residing with JAMES BONOMO, SR., and while a pedestrian, was struck and killed by a still undiscovered hit-and-run driver. JAMES BONOMO, JR.'s widow, DAWN BONOMO, filed a claim with Hartford Accident and Indemnity Company under the uninsured motorist coverage of the family policy on June 13, 1983. This claim was subsequently denied by Hartford on October 5, 1983. DAWN BONOMO then filed her action against Hartford in the Porter Superior Court, Porter County, Indiana, on December 2, 1983, in the initial form of a Complaint for Declaratory Judgment.

ARGUMENT FOR ALLOWANCE OF WRIT

DAWN BONOMO, Petitioner herein, claims that the Indiana statute concerning recovery for wrongful death is in violation of the United States Constitution, particularly the Fourteenth Amendment, Section One, which requires that all states shall grant and provide its citizens with equal protection under the law. The Bonomo claim against Hartford is based upon a contract for uninsured motorist coverage. This being the case, it was argued that the ten-year contract statute of limitations applies to actions, including wrongful death.

The wrongful death statute in Indiana is a bifurcated statute. The statute allows the bringing of an action for wrongful death within two (2) years after the death.

The United States Supreme Court has already determined that the ancient, out-dated and inequitable law of torts concerning the lack of common law recovery for wrongful death should be reversed. The States which are now being forced to address this issue, except the State of Indiana, have followed that sound reasoning and adopted the tenet that recovery for wrongful death is a common law right in the United States.

I. Whether The Law Has Evolved To The Point That A Common Law Right To Recovery For Wrongful Death Exists.

The common argument expressed in support of particular statutes concerning recovery for wrongful death is that there is no common law basis for a cause of action for such death, and that such a cause of action in the State of Indiana is wholly a creature of the Wrongful Death Statute. It has also been applied that since the cause of action is a creature of the death statute, it only exists for the period limited in the body of the statute, the expiration of which period prohibits a remedy to enforce the right, since, the

period being considered a condition precedent to filing the action, the tolling of that period extinguishes such right.

That the common law did not permit recovery for wrongful death is recognized by the leading case of *Baker v. Bolton*, 1 CAMPB. 493, decided in 1908 as the apparent basis for this doctrine. However, because Lord Ellenborough's decision in that case stated no basis for the doctrine which he announced, there has been much discussion and speculation in decisions and scholarly writings as to what its basis may have been. There are some suggestions that the decision is founded upon the "felony-merger doctrine" and others that its basis lies in the principles governing survival of actions at common law. The lack of any discernible basis for the doctrine of *Baker v. Bolton*, and the harsh results it frequently produced, prompted bitter criticism of the decision in England. This criticism and the origin of the doctrine itself were reviewed in a scholarly opinion by Justice Harlan, speaking for the unanimous Court in *Moragne v. State's Marine Lines, Inc.*, (1970) 398 U.S. 375 at 409, 90 S. Ct. 1772, 26 L.Ed.2d 339, which overruled several earlier decisions which had applied the doctrine of *Baker v. Bolton*. *See also, The Harrisberg*, 119 U. S. 199, 7 S. Ct. 140, 30 L.Ed. 358, and, *Tungus v. Skovgaard*, (1959) 358 U. S. 588, 79 S. Ct. 503, 3 L.Ed.2d 524.

In the *Moragne* decision, the Court said:

> "One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous'

> ... Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely remedial matter." 398 U. S. at 381-382, 90 S. Ct. at 1778, 26 L.Ed.2d at 346.

After further criticism of the doctrine of *Baker v. Bolton*, Justice Harlan added:

> "The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age ... The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, was applicable to their situation, and it is difficult to imagine on what basis they might have concluded that it was." 398 U. S. at 386, 90 S. Ct. at 780, 26 L.Ed.2d at 348.

It is by the very language of that decision that the United States Supreme Court has the view that the recovery for wrongful death has become a part of our own common law and the court in *Moragne* case further decided that there was a common law right to recovery for wrongful death under General Maritime Law. The Court's decision was founded in large part upon the general prevalence of non-maritime wrongful death statutes, and it was thus applicable with equal force to non-maritime actions for wrongful death. The Commonwealth of Massachusetts found the *Moragne* decision to be sound reasoning and was convinced that the law in Massachusetts had also evolved to the point where it may now be held that the right to recovery for wrongful death was of common law origin, notwithstanding that there also existed a statute in Massachusetts giving a right of recovery for wrongful death. The Massachusetts Supreme Court went further and held that all prior decisions of that Court which conflicted with the holding that wrongful death was a common law right, were overruled. See, *Gaudette v. Webb*, (Mass. 1972) 284 N.E.2d 222, 61 ALR3d 893.

It is also to be noted that Justice Harlan quoted the opinion of Justice Holmes in his dissenting opinion in the

case of *Panama R. R. v. Rock*, 266 U. S. 209, 45 S. Ct. 58, 69 L.Ed. 250, when he stated:

> "Without going into the reasons for the notion that an action ... does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound that the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the states." 266 U. S. at 216, 45 S. Ct. at 60.

Based upon these authorities, Bonomo would proffer to this Court that the evolution of law has come to the point where wrongful death statutes should no longer be regarded as "creating the right" to recovery for wrongful death, but would be viewed rather as requiring that the action be commenced within a specified period of time as a limitation on the remedy, and not upon the right. To hold that a person who is egregiously injured so as to become virtually a vegetable would have a greater right of recovery, including that person's spouse and children, as opposed to one who dies as a result of his injuries, would stretch the tenets of equal protection and due process beyond their breaking point. Such statutes are inherently in violation of the Constitution of the United States, particularly Section One of the Fourteenth Amendment.

II. Whether A State Statute Concerning Wrongful Death Is An Enabling Statute Or Merely Contains A Statute of Limitations.

As Bonomo has argued in the basic issue presented before the Court, the wrongful death statute in Indiana is not an enabling statute. Wrongful death is now recognized by this Court as a common law right. Therefore, Indiana's wrongful death statute contains a two-year statute of limitations and not a two-year condition precedent to

bringing an action. The Indiana Court of Appeals wrongly construed the wrongful death statute as a condition precedent. *Boeck v. Inter-Insurance Exchange of Chicago Motor Club*, (1977 App.) 175 Ind. App. 69, 369 N.E.2d 1093. In *Boeck*, the Court of Appeals based its decision on logic argued in a footnote of 22 Am. Jur. 2d Section 35, at page 635. In doing so, the Indiana Court of Appeals ignored the vast majority of authority which has held that a contract action exists for uninsured motorist claims, regardless of whether there is merely personal injury or wrongful death. *Turlay v. Farmers Insurance Exchange*, (1971) 488 P. 2d 406, *Bogle v. State Farm Mutual Automobile Insurance Co.*, (1983) 456 A. 2d 156, *Allstate Insurance Co. v. Spinelli*, (1982) 443 A. 2d 1286, *Lemrick v. Grinnell Mutual Insurance Co.*, (1978) 263 N.W.2d 714, *Edwards v. State Farm Insurance Co.*, (1978) 574 S.W.2d 505, *Van Hoozer v. Farmers Insurance Exchange*, (1976) 549 P. 2d 1354, *Selected Risks Insurance Co. v. Dierolf*, (1975) 350 A. 2d 526, *Franco v. Allstate Insurance Co.*, (1974) 505 S.W.2d 789, *Transnational Insurance Co. v. Simmons*, (1973) 507 P. 2d 693, *Hettel v. Rye*, (1972) 475 S.W.2d 536, *Detroit Automobile Inter-Insurance Exchange*, (1972) 197 N.W.2d 155, *Pickering v. American Employers Insurance Co.*, (1971) 282 A. 2d 584, *Sahloff v. Western Casualty & Surety Co.*, (1969) 171 N.W.2d 914, *Hartford Accident & Indemnity v. Mason*, (1968) 210 So. 2d 474, *Schulz v. Allstate Insurance Co.*, (1968) 244 N.E.2d 546, *Schleif v. Hardware Dealer's Mutual Fire Insurance Co.*, (1966) 404 S.W.2d 490, *DeLuca v. Motor Vehicle Accident Indemnification Corp.*, (1966) 215 N.E.2d 482.

> The obligation of the uninsured motorist is not the obligation of the insurer, under its insurance contract, and the tort feasor's right to claim extinguishment of the tort obligation through a plea of prescription does not inure to the benefit of the insurer. The "ex delicto" prescriptive period is personal to the tort feasor and those who derive their status from him. As previously

> noted, neither the law nor the policy intends to provide insurance for the uninsured tort feasor. Both the statute and the policy require the insured to act in a manner of ways to preserve the tort feasor's obligation for the benefit of the insurer and therefore reflect the inimical interests of the insurer and the tort feasor. Sharing no interest in common and having no contractural or other relationship with the tort feasor, the insurer cannot urge the defense of one year's prescription. *Booth v. Fireman's Fund Insurance Co.*, (1968) 218 So. 2d 580.

The Indiana Court of Appeals inferred that the wrongful death statute is not only a cause of action but a time period in which that cause of action may arise. However, the language of the statute would indicate that it is a bifurcated statute which attempts to give a right to an action and then sets a statutory period of limitations for exercising that action. *Boeck* obviously did not compare the language contained in the limitation portion of the wrongful death statute with the limitation period stated for general tort claims. If the Indiana Court of Appeals had compared the two, the Court would see that they are nearly identical in language. The wrongful death limitation period reads as follows:

> "When the death of one is caused by the wrongful act or ommission of another, the action *shall* be commenced by the personal representative of the decedent within two years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission." (Emphasis added). I.C. 34-1-1-2.

By comparing it with the general limitation statute contained in I.C. 34-1-2-2(1), it would appear that the general limitation statute is even more restrictive there

than in the wrongful death statute, in that it provides as follows:

> "The following actions *shall* be commenced within the periods herein prescribed after the cause of action has accrued, *and not afterwards*:
>
> (1) for injuries to persons or character, for injuries to personal property, and for forfeiture of penalty given by statute, within two years."

(Emphasis added). I.C. 34-1-2-2(1).

Obviously, the general provisions for tort claims provide that an action "shall" be commenced within two (2) years after accrual of the cause, *and not afterward*, while the wrongful death statute of limitations period merely provides that the action "shall" be commenced within two (2) years.

Obviously the more equitable interpretation of limitations on actions for wrongful death would make them procedural rather than substantive. *Wohlgemuth v. Meyer*, (1956) 293 P. 2d 816. The clear trend among the states is one of classifying this limitation period as a statute of limitations. The reasoning behind this is clear. Time limitations in wrongful death go to the procedural aspect of the statutes and not to the substantive part. State legislatures have approved wrongful death statute causes, to right the wrong so long carried in British common law, and then they set time limits for a person to take advantage of that cause of action. The time limitations do not go to the right itself, but rather to a person's procedural prerequisites. Bonomo contends that the right exists in common law and that the reference to the time period in the wrongful death statute is merely a statute of limitations. Procedural prerequisites must be met before one can take advantage of the statute, which explains why the limitation periods contained in the different state statutes vary. Not all states

contain the same statutes of limitations for instituting a cause of action, but all states agree that the right exists. Therefore, these limitation periods are procedural and are subject to much greater variance among the states. In order to comply with the Fourteenth Amendment of the Constitution of the United States, the State must be compelled to recognize the common law right of recovery for wrongful death, then set the period of limitations for instituting such an action in accordance with its other statutes.

III. Whether A State Statute Of Limitation Period Concerning Wrongful Death In A Claim Filed Under Uninsured Motorist Coverage Should Be Governed By Contracts Or By Torts.

DAWN BONOMO claims that her action filed under the Hartford uninsured motorist coverage has not been extinguished since it is governed by the ten-year contract statute of limitations contained in I.C. 34-1-2-2(6). Hit-and-run uninsured motorist coverage is strictly contractual under I.C. 27-7-5-2. *Midwest Mutual Insurance Company v. Indiana Insurance Company*, (1980 App.) ___ Ind. App. ___, 412 N.E.2d 84; and, *Taylor v. American Underwriters*, (1976 App.) 170 Ind. App. 148, 352 N.E.2d 86. As such, all uninsured motorist coverage must logically be governed by the ten-year statute of limitations for contracts contained in I.C. 34-1-2-2(6).

> "The duty of the insurer to pay damages arises solely out of its contract with its insured..." *American States Insurance Company v. Williams*, (1972 App.) 151 Ind. App. 99, 278 N.E.2d 295.

DAWN BONOMO's uninsured motorist claim arose on March 28, 1980, the night that JAMES Bonomo, JR., was killed by a hit-and-run driver. Mrs. Bonomo filed suit against Hartford well within the ten-year limitation period set down by I.C. 34-1-2-2(6). This being the case, DAWN

BONOMO's suit against Hartford has not been extinguished since the ten-year contract limitations period has not run.

Actually, the Bonomo claim against Hartford is not governed by the two-year wrongful death statute. Although the holding in *Boeck, supra*, also involved a fact situation where a hit-and-run driver caused a death, it would appear that if the hit-and-run driver had not caused a death, the court would have applied the contract statute of limitations. According to the Court of Appeals in *Boeck*, this is because the wrongful death statute limits the time for *bringing* a cause of action to two (2) years, by prescription. It is thus more advantageous to an insurance company if the person who is a victim of a hit-and-run driver dies as a result of his injuries. Such logic is inherently repulsive to society. The validity of the insurance contract is not based upon whether or not one survives an accident, but rather whether or not one suffers an injury as a result of an accident. It is still a contract regardless of the severity of the injury.

Neither the law nor public policy should intend to provide insurance for the benefit of an uninsured tort-feasor. The insurance provided is a strict contract between the injured party and the insurer. The failure of a tort-feasor to comply with the statute regarding notice of injury in such cases in no way prohibits the rights of an insurer to proceed against the tort-feasor, when finally discovered, to recover its losses incurred as payment for uninsured motorist coverage.

IV. Whether An Insurance Company Is Subject To The Same Responsibilities And Defenses As A Tort-Feasor In An Uninsured Motorist Claim.

The Indiana Court of Appeals wrongly prohibits wrongful death recovery under the statute (I.C. 34-1-1-2) after the passage of two (2) years. The two-year period should be tolled because a hit-and-run driver violates I.C. 9-4-1-45 by

failing to notify the authorities after striking and killing a pedestrian or insured motorist.

I.C. 9-4-1-45 requires that a person involved in an accident must give notice of that accident to the local police or sheriff. Failure to so do is a crime. Failure to so do is also grounds for the tolling of a statute of limitations under I.C. 34-1-2-9.

> "If a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." I.C. 34-1-2-9.

A violator of I.C. 9-4-1-45 cannot be allowed to, first, do all that is in his power to conceal an accident and a cause of action and then later, plead that the time limit has run out on his victim's cause of action. The law prohibits such a ploy.

In the Kentucky case of *St. Clair v. Bardstown Transfer Line*, (1949) 310 Ky. 776, 221 S.W.2d 679, a man was hit and killed by a truck owned by the Defendant-Company. The Company concealled its own identity and that of its driver from the decedent's widow. Over one (1) year after the accident took place, the widow filed a suit against the company charging it with negligence. The Kentucky statute on wrongful death was one (1) year. The court tolled the statute of limitations in that case, even though it had a one-year limitation, on the grounds that Kentucky had a statute (nearly identical to I.C. 9-4-1-45) which required a motorist to make a report to the police.

> "Under the circumstances it ill becomes right of defendant to defeat such an action by pleading limitations when he failed to comply with the statute furnishing an opportunity for notice in such cases, or to insist that it then become the duty of the plaintiff to make a search of possibly the entire nation to ascertain who, if anyone, was negligent in colliding with and killing her husband ... in the circumstances

> defendant should not be allowed to superimpose upon plaintiff in an action like this one the labor and efforts to discover the concealled fact of his (or its) identity when it is his statutory and primary duty to furnish that information as directed by the statute imposing it." *St. Clair, supra.*

Since the hit-and-run driver violated the like notice requirement of I.C. 9-4-1-45, the two-year limitation period of I.C. 34-1-1-2 should be tolled in accordance with I.C. 34-1-2-9. The Hartford Company is equitably estopped from pleading the wrongful death statute of limitations since the hit-and-run driver concealled his identity from the authorities. Equity will step in with its doctrine of estoppel to prevent an inequitable resort to a statute of limitations or a prescription by one who intentionally and fraudulently conceals a cause of action from a party for such length of time that the statute has run.

> "The misrepresentation or fraud must be of such character as to prevent inquiry or to elude investigation or to mislead and hinder the party who has the cause of action from obtaining the necessary information by the use of ordinary diligence, and the actions relied upon must be of an affirmative character and fraudulent." *Landers v. Ervers*, (1940 App.) 107 Ind. App. 347, 24 N.E.2d 796.

In the Bonomo case, the hit-and-run driver fled the scene of the accident, thus eluding investigation. The hit-and-run driver remained silent about the accident despite having an imperative duty to speak under I.C. 9-4-1-45.

> "For silence to satisfy, the conduct requirement (to invoke the doctrine of equitable estoppel), there must be not only an opportunity to speak, there must be an imperative duty to do so." *Collins v. Duniton*, (1975 App.) 163 Ind. App. 201, 323 N.E.2d 264.

By placing a different burden upon Hartford in a claim under uninsured motorist where a death has occurred, than where a mere injury has occurred, the Indiana courts have

inequitably restricted the right of recovery to those entitled to recover for the death. The courts have also changed the requirement of pleading under contract to pleading under a tort. As Bonomo has shown, had her husband been only injured rather than killed, the court would have applied a ten-year contract statute of limitations to bringing the action under uninsured motorist with Hartford, but, because he died, the court says that the wrongful death statute applies even to the uninsured motorist's contract. Such a holding clearly violates the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

Hartford had a contract with the Bonomo family to provide uninsured motorist coverage, including injury as a result of a hit-and-run driver. By applying a two-year wrongful death statute, the Indiana courts have deprived the survivors of Mr. Bonomo from any recovery as a result of his death. In so doing, the courts have inequitably prohibited a recovery under a contract. Hartford would have been liable whether Mr. Bonomo had died or not, but under the inequitable decision of the Indiana courts, a survivor is denied a recovery because of the death.

The Indiana courts have also determined that a statute for wrongful death is a statute which grants a right to bring a cause of action within two (2) years, rather than holding that it is a right under the statute, which contains a two-year limitation period. By delineating between a prescription statute and a bifurcated statute with a grant of a right and a separate statute of limitations, the Indiana legislature and courts have inequitably reduced the possibility of recovery of survivors of one who is killed by a tort feasor.

This court has already determined that there is a common law right for recovery for wrongful death, and as so there can be a statute of limitations imposed for bringing an action, as in any other tort. The Court is required to reverse the Indiana Court of Appeals and the Supreme

Court of Indiana under two (2) separate theories which would apply. This Court may either remand for judgment in favor of Bonomo on the theory that the wrongful death statute merely embodies a common law right, with a two-year statute of limitations which can be tolled by the failure of the tort feasor to perform an imperative duty, or, it may remand to the Indiana courts under the direction that this is an action in contract, with the claim being made under the terms of uninsured motorist coverage, which is available to the Bonomos where an injury occurs, regardless of whether it results in a death or not.

Respectfully submitted,

/s/ Milan D. Tesanovich

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APPENDIX

APPENDIX A

STATE OF INDIANA)		IN THE PORTER
)	SS:	SUPERIOR COURT
COUNTY OF PORTER)		SITTING AT VALPARAISO, PORTER COUNTY, INDIANA
DAWN BONOMO and SUMMER LIN BONOMO and JARED JAMES BONOMO, Minors, by their next friend, DAWN BONOMO,	)	
Plaintiffs	)	
VS.	)	CAUSE NO. 84-PSC-620
HARTFORD ACCIDENT & INDEMNITY COMPANY, a Connecticut Corporation,	)	
Defendant	)	

JUDGMENT

This cause came on to be heard on the Motion of defendant for a Summary Judgment pursuant to Trial Rule 56, and the Court having considered the pleadings in the action, the memoranda submitted and having heard the oral statements of counsel and having found that there is no genuine issue of fact to be submitted to the Court with respect to Counts I and II of plaintiffs' Complaint and having concluded that defendant is entitled to Judgment as a matter of law, it is hereby

ORDERED that defendant's Motion for Summary Judgment is in all respects granted. The Court further

finds that there is no just reason for delay and hereby directs entry of Judgment.

It is, therefore, ORDERED AND ADJUDGED, that Judgment shall be and is hereby entered in defendant's favor with respect to both Counts I and II of plaintiffs' Complaint, with costs for defendant and against plaintiff.

Dated: April 27, 1984.

/s/ Bruce W. Douglas
JUDGE, PORTER SUPERIOR COURT

APPENDIX B

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46410

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO,	)	
Plaintiffs-Appellants	)	
vs.	)	NO. 3-884 A 235
HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	
Defendants-Appellees	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Bruce W. Douglas, Judge
Cause No. 84-PSC-620

GARRARD, J.

MEMORANDUM DECISION

Bonomos sued their insurance carrier to recover for the wrongful death of James Bonomo, Jr. pursuant to the

uninsured motorist provisions contained in their policy. The action was commenced more than three (3) years after James' death. The trial court granted Hartford's motion for summary judgment on the ground that the claim was not timely brought.

Bonomos appeal contends the ten year statute of limitations for contracts should apply and that the wrongful death statute should be treated merely as a statute of limitations and not as a condition to the ability to maintain suit.[1] In the alternative they ask that we declare a common law right to recover for wrongful death. These questions were answered adversely to appellants in *Bocck v. Inter-Insurance Exchange* (1977), 175 Ind. App. 69, 369 N.E.2d 1093. We believe *Bocck* correctly decided these questions and we decline to overrule it.

In addition Bonomos assert that either the wrongful death limitation should be tolled or Hartford should be estopped from asserting it because the driver of the hit-and-run vehicle failed to report the collision or otherwise disclose his identity. The argument is misplaced. There is no suggestion that Hartford or any of its agents or servants did anything whatever to hinder or mislead appellants in pursuit of their claim. Absent any such connection there is no basis for considering a tolling of the statute or other estoppel.[2]

Affirmed.

STATON, P.J. and HOFFMAN, J. Concur.

---

[1] Although not discussed by appellants, the significance of the special statutory action for wrongful death arises from the contractual obligation of the insurer to pay sums which the legal representative "shall be legally entitled to recover from the owner or operator of an uninsured automobile..."

[2] Clearly the identity of the uninsured motorist was not a prerequisite to bringing suit. *Indiana Ins. Co. v. Noble* (1970), 148 Ind. App. 297, 265 N.E.2d 419, 432-33.

APPENDIX C

STATE OF INDIANA

Clerk of the Supreme Court and Court of Appeals

INDIANAPOLIS 46204

Telephone 232-1930

Marjorie H. O'Laughlin,
Clerk
217 State House

No. 3-884A235

Dawn Bonomo et al V. Hartford Accident & Indemnity Co.

You are hereby notified that the Supreme Court has on this day: Appellants (Bonomo) petition to Transfer is hereby DENIED. Givan, C.J.
All Justices Concur, except Hunter, J., who is not participating.
Appellants (Bonomo) request for Oral Argument is hereby DENIED. Givan, C.J.
All Justices Concur, except Hunter, J., who is not participating.

Please acknowledge receipt of this notice in order that our records may show you that you have been notified of this action.

WITNESS my name and the seal of said Court, this 18 day of July, 1985.

/s/ Marjorie H. O'Laughlin
Clerk, Supreme Court and Court of Appeals

85-1328

NO.

FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO,

Petitioners,

-vs-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO,

Petitioners,

-vs-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

On January 18, 1980, Respondent, Hartford Accident & Indemnity Company, hereinafter referred to as Hartford, issued a "family automobile policy" to James Bonomo, as named insured. The policy was to be in effect for a three-month period expiring on April 18, 1980. On March 28, 1980 James Bonomo, II, while a resident of the household of James Bonomo, was struck by a hit-and-run motorist. Bonomo died from the injuries sustained in that accident on March 29, 1980. Thereafter, the widow of James Bonomo, II, Petitioner, Dawn Bonomo, made claim with Hartford pursuant to the uninsured motorist coverage afforded under the policy, which claim was submitted on June 13, 1983. Hartford denied the claim and Mrs. Bonomo filed suit on the policy on December 2, 1983.

The Hartford policy provided, in pertinent part, as follows:

> COVERAGE D--UNINSURED MOTORIST (DAMAGES FOR BODILY INJURY): To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom....
>
> "UNINSURED AUTOMOBILE" includes a trailer of any type and means:
> b. A hit-and-run automobile:
>
> "HIT-AND-RUN AUTOMOBILE" means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile".

On the basis of the foregoing policy language, and in accordance with Indiana law as set forth in Bocek v. Inter-Insurance Exchange of Chicago Motor Club, 369 N.E.2d 1093 (1977) the Court granted Summary Judgment in favor of Hartford.

II

SUMMARY OF ARGUMENT

The Indiana Wrongful Death Statute does not violate equal protection or due process as contemplated by the 14th Amendment. The authority cited by the petitioner is inapplicable to that issue. The Indiana Wrongful Death Statute does not create a suspect class. The effect of the Indiana Wrongful Death Statute is not to create a lesser right of recovery than in the case of one who is merely injured as a result of tortious conduct. The anology drawn by petitioner between claims for personal injury and for wrongful death is erroneous.

The ten year contract statute of limitations does not apply to Bonomo's claim for uninsured motorist wrongful death benefits. The claim was filed more than two years after the action accrued, therefore, Bonomo cannot establish that she is "legally entitled to recover" as required by the Hartford policy. The authorities relief upon by Bonomo were rejected in Bocek and are not controlling

authority in Indiana.

The coverage afforded under the Hartford policy is contingent on Bonomo establishing a legal entitlement to recover from an uninsured or hit-and-run motorist. The purpose behind uninsured motorist coverage is to afford the same protection to a person injured by a hit-and-run motorist as he would have enjoyed if the offending motorist were known and had carried liability coverage himself. Were Bonomo to be allowed to sue under the ten year limitation for contracts she would be given a greater right than would have been available were the tortfeasor's identity known and he carried liability coverage. Such a result would also, in effect, rewrite the policy and contravene its clear intent.

The two year time period contained in the Indiana Wrongful Death Statute is a "condition attached to the right to sue". It is a condition precedent to the existence of the claim and is not a statute of limitation. The Bocek

court was correct in characterizing the two year period for bringing wrongful death actions as a condition precedent.

The two year limitation for filing wrongful death actions is a condition attached to the right to sue and, as such, cannot be tolled or waived. Hartford is not in privity with the hit-and-run motorist and there is no rational basis for imputing the omission of the hit-and-run motorist in failing to report the accident to Hartford. The duty of Hartford arises out of its contract and not by reason of any relationship with the hit-and-run motorist. Bonomo had the option to file an action directly against Hartford within the two year limitation period, and failed to do so. There is no viable authority cited by Bonomo in support of her arguments with respect to tolling of the two year period and estoppel.

III

ARGUMENT

Petitioner advances four theories in support of her argument for allowance of writ. For the purpose of orderly response, these theories have been combined in three subsections below.

A. The Indiana Wrongful Death Statute does not violate the 14th Amendment to the Constitution of the United States.

Petitioner argues that the Indiana Wrongful Death Statute is unconstitutional for the reason that it violates the 14th Amendment providing for equal protection and due process, under the law. As authority, petitioner cites Moragne v. States Marine Lines, Inc., 90 S.Ct. 1772 (1970). However, petitioner's reliance on Moragne, supra, is misplaced. In that case, this Court was called upon to consider the question "of remedies under federal maritime law for tortious deaths on state territorial waters", Moragne, supra, at p.1775. That narrow question was answered in the affirmative.

However, the opinion and decision of this Court in that case has no applicability to the issues presented herein. Indeed, as stated in Moragne, supra, "Maritime law had always, in this country as in England, been a thing apart from the common law", Moragne, supra, at p.1780. The Court, in that opinion, gave its approval to the enactment, by the States, of wrongful death statutes intended to afford a remedy for wrongful death where none had previously existed at common law. The Court also made reference to statutes enacted by Congress in the Maritime context, specifically the Death on the High Seas Act and the Jones Act, stating that "The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery", Moragne, supra, at p.1782.

The holding in Moragne, supra, was simply that "an action does lie under general maritime law for death caused by violation of maritime duties", Moragne, supra, at p.1792. The Court in Moragne did not decide that recovery for

wrongful death has become a part of our common law, as contended by the petitioner, but merely held that there was a common law right to recovery for wrongful death under general maritime law.

Petitioner argues, without any cited authority, that the Indiana Wrongful Death Statute violates the 14th Amendment to the Constitution of the United States and contends that an injured person has a greater right of recovery than one who dies as a result of his injuries. Clearly, an action for personal injury and an action for wrongful death contemplate entirely different classes of claimants:

> "It is true that the harms to be assuaged are not identical in the two cases: In the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him--usually spouse and children--seek to recover for their total loss of one on whom they depended." Moragne, supra, at p.1779.

It is well settled that equal protection of the laws requires that all persons shall be

treated alike under like circumstances and conditions; Hartford Steam Boiler Inspection and Insurance Co. v. Harrison, 57 S.Ct. 838; Colgate v. Harvey, 56 S.Ct. 252; State Board of Tax Commissioners v. Jackson, 51 S.Ct. 540. Clearly, the analogy which petitioner attempts to draw between claims for personal injury and those for wrongful death is erroneous.

B. The ten year contract statute of limitations is inapplicable to petitioners' claim for uninsured motorist coverage. The two year period for bringing a wrongful death action is a condition attached to the right to sue and is not a statute of limitation.

Bocek, supra, involved a set of facts identical to those presented by the case at bar and is dispositive. There, as here, the issue present concerned

> "Whether uninsured motorist coverage is available to one filing a claim more than two years after the wrongful death of the insured." Bocek, supra, at p.1094.

There, as in the instant case, claim was made for uninsured motorist coverage as the result of the death of the decedent more than

two years prior to the filing of the action. In Bocek, supra, the trial court granted Summary Judgment based upon the provisions contained in the contract and the provisions of the Indiana Wrongful Death Statute, I.C. 34-1-1-2. There, as here, the policy provided for uninsured motorist benefits where the insured established a legal entitlement to recover. The Court in Bocek, supra, affirmed Summary Judgment in favor of the insurer on the ground that the claim was filed more than two years after the death giving rise to the claim, i.e. the wrongful death of the decedent, and therefore, the insured could not establish that she was "legally entitled to recover" pursuant to the terms and provisions of the policy.

> "In short, in the case at bar legally entitled to recover involved more than a mere showing of fact but includes the right to recover on an uninsured motorist endorsement pursuant to meeting the condition of the wrongful death Statute. (citation omitted) When a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements such as with uninsured motorist coverage the parties are presumed to have entered into their agreement with reference to the statute.

> (citations omitted) Appellant's right to recover against the deceased's insurer under the uninsured motorist endorsement is derivitive and conditional. Unless she is "legally entitled to recover damages" for the wrongful death of Cooper from the uninsured motorist, the contract upon which she sues precludes her from recovery against the Appellees...Appellant filed her Complaint on February 14, 1974. More than three years had passed since the accident occurred in which Aubrey Cooper died. The statute allowing for recovery for wrongful death had expired within that time period. Since Appellant's legal right to recover was based thereon it is clear that her cause of action expired with it." Bocek, supra, at pp.1097-1098.

As in Bocek, Bonomo attempts to draw an analogy between an action for personal injury and her claim for wrongful death and argues that the coverage provided is not based on whether or not one survives an accident but rather whether or not one is injured as a result of an accident. However, in so doing, she ignores the policy requirement that she be "legally entitled to recover". As stated by the Court in Bocek:

> "However these factors cannot be isolated to avoid the contingent characteristics of the coverage. I.C. 1971, 27-7-5-1, supra, does not create a new right in the plaintiff to sue an uninsured motorist; it merely provides a new procedure whereby such plaintiff may recover his loss against his own insurer. (citations omitted) Thus any action on the contract is inescapably tied to the legal liability of the uninsured motorist. Without this liability, recovery is barred since the right to recover contemplated by the statute stems from the right of action against a tort-feasor." Bocek, supra, at p.1096.

Although "hit-and-run" coverage is not required by the Indiana Uninsured Motorist Statute and is in fact greater coverage than that which is required by law, the rational for such coverage, as set forth in Bocek, is equally applicable to this case:

> "However, it must be remembered that the purpose behind uninsured motorist coverage and the statute which require the same is to afford the same protection to a person injured by the uninsured motorist as he would have enjoyed if the offending motorist had himself carried liability insurance." Bocek, supra, at p.1097.

In line with this reasoning, the Court in Bocek, went on to state, in affirming Summary

Judgment in favor of the insurer:

> "Any hardship occasioned by such a result is no greater than it would be for any person failing to bring his wrongful death action pursuant to the statute. Moreover if Bocek were allowed to sue under the ten year limitation for contracts she would in effect be given a greater right than would have been available to her were the tortfeasor covered by ordinary liability insurance." Bocek, supra, at p.1098.

It is well settled, in Indiana, that the two year time period within which an action must be commenced is a "condition attached to the right to sue" and that this two year time period is not a statute of limitation but a condition precedent to the existence of the claim; General Motors Corp. v. Arnett, 418 N.E.2d 546 (1981). The Court, in Bocek, correctly outlined the rationale and history behind our Wrongful Death Statute and the two year limitation period:

> "This statutory creation of the right to sue in cases involving a wrongful death is intended to provide for the financial loss suffered by the widow, children or next of kin because of the death of the person involved. It was specifically enacted to

> to overcome the result occasioned by adherance to the old English case of Baker v. Bolton (citation omitted)....Furthermore since the right is statutory, that portion which requires that the cause should be brought within two years is considered a condition attached to the right to sue and is not merely a statute of limitation. (citation omitted) As such it cannot be construed as a defense to an action which a defendant may interpose or waive, but it is a condition of the statute imposing liability." Bocek, supra, at pp. 1096-1097.

Any comparison between the wording of the two year limitation contained in the Wrongful Death Statute and that contained in the statute of limitations for personal injury, as contended by Bonomo, is wholly irrelevant. The Indiana Court, in Bocek, did not wrongly characterize the two year period for bringing wrongful death actions.

C. The two year limitation period for filing a wrongful death action cannot be tolled/ Hartford is not estopped from pleading the two year time limitation contained in the wrongful death statute.

Petitioner argues that Hartford should be bound by the hit-and-run driver's failure to

report the accident as required by Indiana law. She argues that Hartford stands in the shoes of the hit-and-run driver and, therefore, somehow must be bound by his actions. This argument is without merit, as stated in Bocek: "The duty of the insurer to pay damages arises solely out of its contract with its insured and not by reason of any special relationship between the insurer and the uninsured motorist", Bocek, supra, at p.1096. In support of her argument, Bonomo cites St. Clair v. Bardstown Transfer Line, 221 S.W.2d 679 (1949), a Kentucky case which was decided in the context of a direct action against the tortfeasor who had concealed his identity. This case is patently distinguishable from the facts at bar and offers little guidance in deciding the issues presented. As pointed out by the Indiana Court, in Bocek, the duty of the Hartford must arise out of its contract and not because of any relationship with the hit-and-run driver. Hartford was not in privity with the hit-and-run driver and there are no facts which might tend to establish some

relationship whereby the omission of the hit-and-run driver in failing to report the accident could be imputed to Hartford. Petitioner misses the point when she argues that the two year period for filing the wrongful death claim should be tolled, or in the alternative, Hartford should be estopped from raising the two year period by way of defense and ignores the clear policy language that an insured be "legally entitled to recover" from the hit-and-run driver. Her options were clearly set forth in Indiana Insurance Co. v. Noble, 295 N.E.2d 419 (1970), as follows:

> "Under the relevant case law the insured-claimant who has a claim against an uninsured motorist has the following options open to him:
>
> 1. He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.
>
> 2. He may file an action joining both the uninsured motorist and the insurance company as party defendants and litigate all of the issues of liability

and damages in that action.

3. He may file an action against the uninsured motorist alone without joining the insurance company as a party defendant and litigate the issues of liability and damages. In such case he gives preliminary and adequate notice of the filing and pendency of such action to the insurance company so that they may take appropriate action including intervention.

4. He may file an action against the uninsured motorist and give no notice to the insurance company.

Noble, at pp.432-433.

Clearly under the guidelines set forth in Noble, Bonomo could have exercised option 1 and brought action directly against Hartford pursuant to the terms and provisions of the policy. This, for whatever reason, she chose not to do. As stated in Noble, "there can be no question that under options 1 and 2 the insurance company is bound by the determination of the issues of liability and damages....", Noble at p.433.

Bonomo does not cite any authority in Support of these propositions. Likewise, the

doctrine of equitable estoppel should not be available to one who has rested on her rights in excess of three years since the action accrued. As set forth in Bocek, the two year period for bringing a wrongful death action is a condition attached to the right to sue and as such, cannot be construed as a defense which can be interposed or waived. It is a condition which must be satisfied before there can be a liable claim for wrongful death. Bonomo failed to satisfy this condition precedent and her claim, therefore, is nonexistent.

V

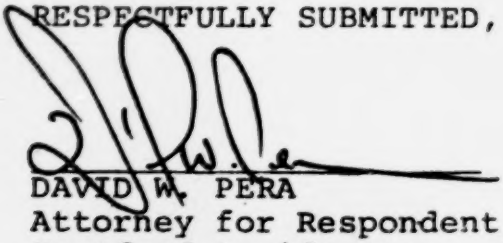
CONCLUSION

There is no question that the Indiana Wrongful Death Statute is constitutional and does not violate equal protection or due process.

The ten year contract statute of limitations is inapplicable to Bonomo's claim, pursuant to Bocek, supra. The two year period for bringing wrongful death actions is a condition precedent to the existence of the claim, Arnett and Bocek, supra. There is no rational basis for tolling that two year period nor does the doctrine of equitable estoppel apply. Bonomo's claim for wrongful death arose on March 29, 1980. She did not file suit against Hartford, for wrongful death uninsured motorist coverage, until December 2, 1983, more than three (3) years after the occurrence which gave rise to her claim. She could have made claim and brought suit against the Hartford for those benefits at any time

within the two year period, pursuant to Noble, supra. Having failed to do so, her right of action for wrongful death against Hartford was extinguished two years after the occurrence. The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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PROOF OF SERVICE

I hereby swear under the penalties of perjury that on the 12 day of November, 1985, I served upon the opposing counsel of record in the above-entitled cause one (1) copy of the Brief in Opposition to Petition for Writ of Certiorari by depositing the same in the U.S. Mail, first class postage prepaid, addressed as follows:

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